MN Construction Sdn Bhd v Evelyn @ Evelyn Sudan ak Augustine and other suits

HIGH COURT (SIBU) — SUIT NOS 22–62 OF 2003, 22–63 OF 2003, 22–64 OF 2003 AND 22–65 OF 2003
HAMID SULTAN JC
24 SEPTEMBER 2008

Civil Procedure — Action — Consolidation of actions — Declaration sought — All necessary parties not before court — Whether could be granted

Civil Procedure — Costs — Change of events at commencement of trial — First defendant now deceased, while second defendant transferred property to son — Whether costs to be awarded for failure to inform — Whether solicitors personally to bear costs of suits

Contract — Breach of — Specific performance — Native land — Specific prohibition and restriction on land title — Prohibiting non-native from entering into development agreement — Whether illegal consideration — Contracts Act 1950 s 24 — Sarawak Land Code s 8

Contract — Time — Completion of — Stipulated in agreement — Whether to be of essence — Whether delay was beyond plaintiff control — Whether breach went to root of contract

The plaintiff's (developer) action against the defendants ('landowners') was in respect of development agreements. The plaintiff contended, inter alia, that they had diligently acted upon the development agreement and obtained the necessary approvals from the relevant authority. However, due to the emergence of new laws and regulations subsequent to the signing of the agreements requiring among others, the need for building low cost houses in the project and the need to obtain the environment impact assessed, there were some delays on progress of the development. When the plaintiff was about to commence the construction works, the defendants terminated the agreement but later withdrew the said termination letters. Nevertheless, the plaintiff was still prevented or disallowed from commencing with the project as a result of which they had incurred expenses and stood to suffer a huge loss of profit which the defendants were in no position to compensate. In

consequence, the plaintiff was seeking, inter alia, for specific performance and damages. The defendants however, counterclaimed against the plaintiff, inter alia, for a declaration that the defendants had validly terminated the said agreement. They alleged that the plaintiff was in breach of the development agreement for failing to obtain approval for the subdivision of the land and the building and engineering plans within two years from the date of the said development agreement. They further alleged that the plaintiff had failed to complete the whole development project within five years from the date of the development agreement. The defendants also contended that the development agreement or allocation agreement or supplementary power of attorney was signed in contravention of s 5 of the Housing Developers (Contract and Licensing) Ordinance 1993. Further, they also alleged that the land in issue was native land and it was illegal for the plaintiff, who was non-native, to enter into the development agreement as it was against public policy or unlawful or illegal or in essence, breach of the Sarawak Land Code ('Code').

Held, dismissing the plaintiff's claim and the defendants' counterclaim with no order as to costs:

(1) By the reading of s 5 of the Housing Developers (Contract and Licensing) Ordinance 1993 with Form A of the Housing Developers (Control And Licensing) Regulations 1998, it was clear that a developers license was only necessary when the land in issue per se had been approved for development purposes because the condition precedent to obtaining a developer's license requires the land title and the agreement with the landowners to be produced for the purpose of application. Thus, to argue that because the plaintiff had no developer's license, the development agreement and other subsequent documents were invalid had no merits (see para 7(a)).

(2) Section 8 of the Code prohibits the plaintiff who was non-native from entering into the development agreement in the present form to represent an unconditional contract in relation to s 8 of the Code which the court could not give effect to (see para 7(a)).

(3) On the facts, the second defendant had transferred the property to his son during the course of trial and the plaintiff had not made the personal representative a party to present the action. Further, no amendment was sought to the prayers despite the suit was said to be consolidated. Thus, procedurally the court could not grant the prayers sought in the present form by the plaintiff in the consolidated action as all the necessary parties were not before the court (see para 7(b)).

(4) In the instance case, the delay complained of was not one which the parties had agreed to condone pursuant to the terms of the development agreement. Despite five years of the signing of the development agreement the plaintiff had barely started with the construction works. It was abhorrent to notions of justice and fair play to condone the delay. In the circumstances, there was merit in the defendants complaint of delay and in consequence the defendants' had rightfully terminated the development agreement (see para 7(c)).

[Bahasa Malaysia summary

Tindakan plaintif (pemaju) terhadap defendan-defendan ('pemilik tanah') adalah berkenaan dengan perjanjian-perjanjian pembangunan. Plaintif menegaskan, antara lain, bahawa mereka telah melaksanakan dengan teliti perjanjian pembangunan dan telah mendapatkan kelulusan-kelulusan yang perlu daripada pihak berkuasa yang berkenaan. Tetapi, disebabkan kemunculan undang-undang dan peraturan baru selepas perjanjian ditandatangani yang memerlukan antaranya, keperluan pembinaan bangunan kos rendah di dalam projek dan perlu mendapatkan penilaian kesan persekitaran, terdapat kelewatan dalam perkembangan pembangunan. Apabila plaintif hendak memulakan kerja-kerja pembinaan, defendan-defendan telah menamatkan perjanjian tetapi kemudiannya menarik balik surat penamatan tersebut. Walau bagaimanapun, plaintif tetap dihalang atau tidak dibenarkan daripada memulakan projek tersebut dan mengakibatkan mereka menanggung perbelanjaan dan kerugian yang besar yang mana defendan-defendan tidak berada dalam keadaan yang boleh memberi pampasan. Akibatnya, plaintif memohon, antara lain, perlaksanaan spesifik dan ganti rugi. Walau bagaimanapun, defendan-defendan membuat tuntutan balas terhadap plaintif, antara lain, untuk satu deklarasi bahawa defendan-defendan telah secara sahnya menamatkan perjanjian tersebut. Mereka mendakwa bahawa plaintif telah melanggar perjanjian pembangunan apabila gagal mendapatkan kelulusan untuk subbahagi tanah dan plan bangunan dan kejuruteraan dalam masa dua tahun dari tarikh perjanjian pembangunan. Mereka juga selanjutnya berhujah bahawa plaintif telah gagal untuk menyiapkan kesemua projek pembangunan dalam masa lima tahun dari tarikh perjanjian pembangunan. Defendan-defendan juga menegaskan bahawa perjanjian pembangunan atau perjanjian penempatan atau surat kuasa wakil tambahan telah ditandatangani, bertentangan dengan s 5 Ordinan Pembangunan Perumahan (Kontrak dan Perlesenan) 1993. Selanjutnya, mereka juga mendakwa bahawa tanah yang digunakan adalah tanah anak negeri dan adalah menyalahi undang-undang bagi plaintif, yang bukannya anak negeri, untuk memasuki perjanjian pembangunan yang mana adalah bertentangan dengan polisi awam atau tidak sah atau menyalahi

undang-undang, atau secara dasarnya, menyalahi Kanun Tanah Sarawak ('Kanun').

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan-defendan tanpa perintah untuk kos:

(1) Apabila membaca s 5 Ordinan Pembangunan Perumahan (Kontrak dan Perlesenan) 1993 bersama Borang A Peraturan-Peraturan Pembangunan Perumahan (Kawalan dan Perlesenan) 1998, ianya adalah jelas bahawa lesen pemaju hanya perlu apabila tanah yang menjadi isu sahaja telah diluluskan untuk tujuan pembangunan kerana syarat terdahulu, untuk mendapatkan lesen pemaju memerlukan hakmilik tanah dan perjanjian dengan pemilik tanah perlu dikemukakan untuk tujuan permohonan. Oleh itu, mempertikaikan plaintif tidak mempunyai lesen pemaju, perjanjian pembangunan dan dokumen-dokumen selanjutnya yang lain adalah tidak sah dan tidak bermerit (lihat perenggan 7(a)).

(2) Seksyen 8 Kanun, tidak membenarkan plaintif yang bukan anak negeri daripada memasuki perjanjian pembangunan dalam keadaan sekarang untuk mewakili kontrak tanpa syarat yang berkaitan dengan s 8 Kanun yang mana mahkamah tidak dapat memberikan kesan terhadapnya (lihat perenggan 7(a)).

(3) Berdasarkan fakta, defendan kedua telah memindahmilik hartanah kepada anaknya semasa perbicaraan dan plaintif tidak dijadikan wakilnya sebagai pihak untuk menghadiri tindakan tersebut. Selanjutnya, tiada pindaan telah dipohon terhadap permohonan-permohonan walaupun guaman dikatakan telah digabungkan. Oleh itu, secara prosedurnya, mahkamah tidak boleh memberikan permohonan-permohonan yang dipohon dalam keadaan sekarang oleh plaintif di dalam tindakan gabungan kerana kesemua pihak-pihak yang perlu tidak ada di hadapan mahkamah (lihat perenggan 7(b)).

(4) Dalam kes ini, kelewatan yang diadukan bukannya yang dipersetujui oleh pihak-pihak untuk dibiarkan berikutan kepada terma-terma perjanjian pembangunan. Walaupun telah lima tahun perjanjian pembangunan telah ditandatangani, plaintif baru sahaja memulakan kerja-kerja pembinaan. Adalah amat dibenci oleh tanggapan keadilan untuk membiarkan kelewatan. Dalam keadaan ini, terdapat merit di dalam aduan defendan-defendan berkenaan dengan kelewatan dan natijahnya defendan-defendan secara betulnya menamatkan perjanjian pembangunan tersebut (lihat perenggan 7(c)).]

Notes

For a case on breach of specific performance, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2704.

For cases on consolidation of actions, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 78–84.

For cases on cost generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1867–2239.

For cases on time generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5212–5441.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Araprop Development Sdn Bhd v Leong Chee Kong & Anor [2008] 1 MLJ 783; [2008] 1 CLJ 135, CA (refd)

Business Focus Capital Sdn Bhd v Affin Bank Bhd [2007] 7 CLJ 1, HC (refd)

Chelingga ak Asuh @ Asu v Wong Sew Yun & Ors [2008] MLJU 0514, HC (refd)

Corrugated Carton Products Sdn Bhd v Kong Long Huat Realty Sdn Bhd [2003] 3 MLJ 193; [2003] 3 CLJ 543, HC (refd)

Futuristic Builders Sdn Bhd v Harinder Singh & Ors [2008] 2 MLJ 273; [2008] 3 CLJ 117, FC (refd)

Manang Lim Native Sdn Bhd v Manang Selaman [1986] 1 MLJ 379, SC (not folld)

National Skin Centre (Singapore) Pte Ltd v Eutech Cybernetics Pte Ltd [2002] 1 SLR 241, HC (refd)

Palaniappa Chettiar v Arunasalam Chettiar [1962] AC 294, PC (refd)

Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor [2002] 6 MLJ 236, HC (refd)

Penguasa (Jabatan Tanah dan Survei, Bintulu) & Ors v Amit bin Salleh & Ors [2008] 4 MLJ 567, CA (refd)

Peter Ng Teck Joo v Vincent Ponniah [1985] 2 MLJ 146, HC (refd)

PP v Zulkifli Arshad [2004] MLJU 152; [2004] 2 CLJ 643 (refd)

Robert Lee & Robert Seet & Anor v Wong Ah Yap & Anor [2007] 4 MLJ 393; [2007] 4 CLJ 1, FC (refd)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)

Toh Huat Khay v Lim A Chang (in the capacity of an executor for the estate of Toh Hoy Kay, deceased) [2008] 4 MLJ 74, CA (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Contracts Act 1950 s 24

Housing Developers (Contract and Licensing) Ordinance 1993 s 5, 5(4)

Housing Developers (Contract and Licensing) Regulations 1998 Form A

Malacca Lands Customary Rights Ordinance (Cap 125)

A Rules of the High Court 1980 O 15
Sarawak Land Code s 8

Wong Ho Leng (Wong Ho Leng & Co Advocates) for the plaintiff.
Siti Nurashidah (Huang & Co & Associates, Advocates) for the defendants.

B **Hamid Sultan JC:**

[1] This is my judgment in respect of the plaintiff's (developer), now Kasen Sdn Bhd, action against the defendants' landowner in respect of development C agreements. And the plaintiff pray for the following orders: (a) specific performance of the development agreement; (b) damages for breach of contract in lieu of or in addition to specific performance; (c) an order that the defendants indemnify the plaintiff all damages that may be claimed against the plaintiff by the other landowners whose land had been amalgamated with D the defendants' lands in the development project; (d) interests, costs, etc.

The defendants are also having a counterclaim and seek the following prayers: (i) damages; (ii) a declaration that the said development agreement, power of attorney, allocation agreement and supplementary power of attorney were E validly terminated by the defendants and ceases to be of further effect; (iii) an order that all the approved plans and improvements and earth works on the said lands and in relation to the said lands be forfeited to the defendants; (iv) an order for the delivery of vacant possession of the said lands to the defendants forthwith; (v) interests, costs, etc.

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[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary G re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness H statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS (THE PLAINTIFF'S VERSION)

I **[3]** The plaintiff's action constituted four suits each one of them naming one of the defendants above named. The suits were consolidated. The issues relating to all the four suits are the same and the evidence led was identical. One of the defendants to the Suit No 22-62 of 2003 passed away and the plaintiff say it has to be put on hold because the defendant has passed away

and the estate has not been administered. The defendants also had signed supplemental agreement dated 6 July 1999 to the development agreement dated 14 March 1997 in respect of the allotment of shop lots to the defendants pursuant to the development agreement (allocation agreement). A

The plaintiff, inter alia, says: (i) that the consolidated suits concern a development project on 14 parcels of land. The defendants herein are the owners of the said land. And one Lina Ding is the owner of the other two lands; (ii) the plaintiff had diligently acted upon the development agreement and obtained the necessary approvals from the relevant authority; (iii) after the development agreement was signed new laws and regulations were implemented by relevant authorities including the requirement of low cost house to be built in the project and the project could not begin before the environment impact was assessed and approved. This led to some delay but the defendants knew the progress of the development; (iv) when the plaintiff were about to commence the construction works the defendants terminated the agreement. Later three defendants namely: Bujang bin Akei, Evelyn @ Evelyn Sudan ak Augustine and Getrude bt Taha withdrew the termination letters but the plaintiff were still prevented or disallowed to commence the project; (v) the plaintiff had incurred expenses in excess of RM1m, and stood to suffer huge loss of profit which the defendants were in no position to compensate, and in consequence, the plaintiff is seeking for specific performance. And the plaintiff in addition say that the plaintiff will be facing claims by Lina Ding and will seek an order for the defendants to indemnify the plaintiff in the event of such claims. B C D E

The defendants though have filed separate defence and counterclaim appears to be similar. In crux, the defendants say: (i) the plaintiff is in breach of the development agreement for failing to obtain approval for the subdivision of the said land and the building and engineering plans on or before 13 March 1999 within two years from the date of the said development agreement and also failed to complete the whole development project within five years from the date of the development agreement; (ii) the plaintiff did not request for the extension of time from the defendants to obtain the requisite approval; (iii) the plaintiff is estopped from alleging, being affected by force majeure after expiration of the said duration; (iv) the defendants signed the allocation agreement under a mistake of fact after having been misled by representation from a director of the plaintiff, in that upon the defendants signing the allocation agreement the construction works for the houses can commence immediately, and thereby giving the impression and indirectly misleading the defendants into believing that all the houses can still be and would be completed within the five years period; (v) at the time of the execution of the said allocation agreement and during the year 2000, the building plans for the houses had not been approved by the authorities; (vi) the construction works of the houses on the said land had not started; (vii) the plaintiff only obtained the developers licence, advertisement and sale permit on 10 June F G H I

2003. In consequence, the allocation agreement and the supplementary power of attorney were signed without having a valid developer's license in contravention of s 5 of the Housing Developers (Contract and Licensing) Ordinance 1993 ('HDCLO 1993'); (viii) the land in issue are native land and the plaintiff is not a native and ought not to have entered into the development agreement or the said allocation agreement as they are against public policy or unlawful or illegal or in essence breach of s 8 of the Land Code of Sarawak ('SLC') and thereby is null and void ab initio. And in the counterclaim says that the plaintiff did not have valid licence. (ix) it is an express condition that the plaintiff must complete the defendants' building within the five years, ie on before 13 March 2002 and in consequence are entitled to the prayer in the counterclaim.

PRELIMINARIES

[4] Four witnesses gave evidence for the plaintiff. Two witnesses gave evidence for their respective suits. The fourth defendant did not give evidence. The first defendant has passed away. I take the view that as the issues are the same against all defendants the decision will bind all the parties. In the instant case, the plaintiff ought to have applied for the personal representative of the deceased defendants to be named as a party and instaneously served the papers on them pursuant to O 15 of the Rules of the High Court 1980. In this case, it was not done. Further, the second defendant says that he has transferred the property on to the name of his son. The solicitors for the defendants only revealed this information during the course of the defendants' case. The court notes this act as grossly unacceptable for solicitors to take procedural advantage of the proceedings to defeat the plaintiff's claim. On such facts, the court ought to personally order the costs of the suits to be borne by the solicitors.

The plaintiff in this case, say that the primary issues are whether the plaintiff is entitled to specific performance and whether the development agreements are illegal. However, the defendants substantially rely on the law and say the plaintiff's action must be dismissed.

In terms of evidence, the plaintiff and the defendants led evidence to set out their case. The plaintiff's case is captured in the evidence of PW1 and the defendants' case in their respecting evidence. I do not wish to set them out here. Very importantly, I note that the defendants were not having independent solicitors for the preparation of the development agreement and the allotment agreement and the evidence of the solicitors PW2 did not throw much light on whether the defendants understood their rights, obligation and the consequence of signing the various agreements including the supplementary power of attorney. It would have been prudent in cases of this nature for the executants of the development agreement to ensure that they have independent legal advisers.

During the cause of trial, the plaintiff applied to amend the statement of claim to read as follows:

> The defendant had withdrawn the termination letter but still disallow the plaintiff to commence the said construction.

I reserved my decision to the end trial. After hearing the evidence, I take the view that there is no prejudice to the defendants if I allow the amendment and I accordingly allow the amendment.

THE DEFENDANTS' ARGUMENT

[5] The defendants say: (i) it is illegal for the plaintiffs who is a non-native to enter into the development agreement allocation agreement pursuant to s 8 of the SLC which reads as follows:

> 8 Save as provided in section 9 —
>
> (a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;
>
> (b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to paragraph (d) any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished;
>
> (c) any person purporting to enter into an agreement to which paragraph (b) applies shall be guilty of an offence: Penalty, a fine of one thousand ringgit and, in the case of a native offender, an additional fine of a sum equivalent to the value of any consideration which the court is satisfied has been received by that native offender or has been received by another person on his behalf or by his direction;
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> (d) in any case in which a person is convicted of an offence under paragraph (b), the court may, if there is reason to believe that such person did not appreciate he was contravening paragraph (a) and had no reason to believe he was entering into a prohibited transaction, impose no fine and may also, if it has imposed an additional fine on a native offender and this paragraph applies to the non-native offender, order the payment to such non-native offender out of such fine of such sum by way of compensation to the non-native offender as it may deem fit in all the circumstances;

(e) subject as aforesaid and to any remedy for the recovery of any fine imposed, the rights and privileges of any native shall not be adversely affected by any agreement to which paragraph (b) applies;

(f) upon any conviction of an offence under paragraph (c), the court shall have power to order the eviction of any person, being a non-native or a person claiming under a non-native in possession or occupation of any land in relation to which the offence was committed, and may for such purpose by warrant addressed to any police officer order him to remove any such person as aforesaid;

(g) a complaint of an offence under paragraph (c) may be made by a District Officer or a Superintendent or by any person generally or specially authorized in that behalf by the Public Prosecutor, but may not be made by any other person; and

(h) notwithstanding anything in any other written law, a court of a Magistrate of the First Class may exercise without any limitation the jurisdiction conferred on the court by this section.

And relies on the case of *Futuristic Builders Sdn Bhd v Harinder Singh & Ors* [2008] 2 MLJ 273; [2008] 3 CLJ 117 where the Federal Court held that a joint venture agreement signed by the administrator involving the estate of a deceased person before the issue of the letters of administration ('LA') to the estate is invalid and unenforceable because the signatory did not have the legal capacity as an administrator prior to the issuance of LA and therefore has no authority to deal with the estate. And asserts in the instant case, the plaintiffs did not have the status of a native or 'deemed-native' under s 8 of the Land Code. As such, the plaintiffs did not have the legal capacity of a 'native' to sign the development agreements and allocation agreements with the purpose of acquiring rights and interests in the said native area lands.

(ii) the defendants also distinguish the decision of the Court of Appeal in *Penguasa (Jabatan Tanah dan Survei, Bintulu) & Ors v Amit bin Salleh & Ors* [2008] 4 MLJ 567 where a joint venture agreement ('JV agreement') was made, whereby the natives of Sarawak occupying a native communal reserve teamed up with a non-native company to form a joint venture company (JV company). The natives held 25% shares and the non-native company held 75% in the JV company. Under the terms of the JV agreement, the JV company would apply to the relevant authorities for approval to plant oil palm and other crops on the land and the natives would apply to Lands and Surveys Department to convert the land from communal reserve land to mixed zone land for a term of 60 years for land title to be issued and transferred to JV company. The Court of Appeal in the above case held that the JV agreement is a conditional agreement and therefore could not be void for illegality.

The defendants say that: (i) in the above case, there was no land title issued to the natives in respect of the communal reserve land. There was no title condition to be breached because the land is legally still state land. The natives cannot deal with the land by selling or transferring it to others; not even to other natives; (ii) in our present case, land titles were already issued to the defendants (landowners) with specific prohibition and restriction on the land title that it is native area land and the use is thereby prohibited and restricted by s 8 of the Land Code. The landowners (defendants) have all freedom to sell or transfer or deal however they liked to other natives. But as soon as the defendants entered into agreements which result in non-natives acquiring rights or interest in the said lands, the title condition is breached. Once title condition is breached, it invokes s 8 which renders the agreements 'deemed to have been entered into for illegal consideration'. By s 24 of the Contracts Act 1950, the agreements are void. And says that the above case has no application to the instant case; (iii) further, the defendants rely on the case of *Robert Lee & Robert Seet & Anor v Wong Ah Yap & Anor* [2007] 4 MLJ 393; [2007] 4 CLJ 1 which involves Malacca Lands Customary Rights Ordinance (Cap 125) which stipulated that only a Malay domiciled in Malacca or a person holding a certificate from the Governor in Council of Malacca is qualified to hold MCL land, the Federal Court enunciated that:

> The Ordinance are laws made with a definite objective. No rules of equity (or common law) should be applied that would defeat such objective. What more, when it is to give effect to a transaction declared to be invalid by the statute. Unfortunately, quite often, equitable rules have been applied without considering the restrictions imposed by statue (Civil Law Act 1956). Not only have that, but the application of the rules consciously or unconsciously, been extended to situations beyond the original or earlier situations, which leads to even greater injustice.
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> Here, there was an act of two persons that contravened the written law and which, if given effect to, would defeat the whole purpose of the written law sought to protect. The bigger picture must not be missed. It is true that the courts, through its decisions, try to arrive at a 'fair and just' result. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. In this case, the law protecting the ownership of Malays over some areas of land was enacted by legislature as a matter of policy If at all it should be repealed or amended, let it be decided, as a matter of policy, by the legislature, not the court through its decision.
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> And also rely on the case of *Toh Huat Khay v Lim A Chang (in the capacity of an executor for the estate of Toh Hoy Kay, deceased)* [2008] 4 MLJ 74 and *Palaniappa Chettiar v Arunasalam Chettiar* [1962] AC 294 where the Privy Council stated that:

No court will lend its aid to a man who founds his cause of action upon immoral or illegal act.

(iv) further, the defendants say that the supplementary powers of attorney are void and rely on the case of *Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor* [2002] 6 MLJ 236 where Clement Skinner J observed:

> ... a colourable devise entered into to facilitate an evasion of the Code and thus deemed to be entered into for an illegal consideration under s 8 of the Land Code.

(v) the defendants assert the delay was attributed by the plaintiff itself and says it is trite where time has been stipulated in an agreement expressly to be of the essence, it is of primary importance and the time stipulations must be adhered to and rely on the case of *Peter Ng Teck Joo v Vincent Ponniah* [1985] 2 MLJ 146. Further, the defendants rely on the case of *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783; [2008] 1 CLJ 135, where the court held, inter alia, that the appellant had failed to do all of the things that the appellant had promised. The delay in delivering the property was caused by delays of the relevant authorities in circumstances beyond the appellant's control. The court was of the view that the appellant's breach did not go to the root of the contract.

(vi) further, the defendants say that there was no extension of time granted, by the defendants. Even if extension of time was granted it does not mean the defendants have waived the completion time and rely on the case of *Business Focus Capital Sdn Bhd v Affin Bank Bhd* [2007] 7 CLJ 1, where the sale and purchase agreement stipulated time to be of essence. The seller had given extra time to the buyer to pay the purchase price and buyer applied for loan to finance the purchase including the initial payment. Buyer failed to do all it could to sort out loan documents for the initial payment to be released. There was no written agreement for extension of time to payment. The court held that despite seller had given buyer extra time, that does not negate that time is of the essence. The consent to give extra time does not mean that the vendor has waived the completion time. The court therefore held that the seller is entitled to terminate the agreement. And also relies on the case of *Corrugated Carton Products Sdn Bhd v Kong Long Huat Realty Sdn Bhd* [2003] 3 MLJ 193; [2003] 3 CLJ 543, where the court held that even if a clause in an agreement provides extension of time, it did not automatically extend time. The party requiring

extensions still have to notify the other party its desire to have the extension of time.

(vii) the defendants says that if the withdrawn letters were genuine, the whole cause of action of the plaintiff based on the termination falls.

(viii) the defendants also say the plaintiff has no financial ability to carry out the project etc, which need not be set out here in detail.

THE PLAINTIFF'S ARGUMENT

[6] Learned counsel for the plaintiff says: (i) according to PW1, the plaintiff had diligently and used all means in their power to apply for approval of all the plans requisite for the development project. This was never put to PW1 during cross-examination and must be taken as accepted and relies on the case of *Public Prosecutor v Zulkifli Arshad* [2004] MLJU 152; [2004] 2 CLJ 643; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; (ii) the defendants are in breach of the development agreement by issuing letters of termination; (iii) the licence and advertisement and sale permit could only be applied after the building plan; (iv) the allocation agreement was signed outside the two years. None of the defendants exercised the option of terminating the development agreements. And says that even if the defendants elects not to terminate the development agreement after the plaintiff was in breach but chose to continue with it, time was set at large and was no longer a condition. However, the plaintiff says the defendants were entitled thereafter to make time of the essence again by giving reasonable notice to the plaintiff and relies on the case of *National Skin Centre (Singapore) Pte Ltd v Eutech Cybernetics Pte Ltd* [2002] 1 SLR 241; (v) the plaintiff asserts by signing the allocation agreement the defendants have abandoned their option to terminate the development agreements and relies on the case of *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151, where the Federal Court held:

> Failure by the appellant to fulfil this condition would entitle the Respondent to have the option of treating the agreement either (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged there from. He must be deemed to have elected the agreement as still continuing.

A [7] I have heard the evidence, read the documents and submissions of the parties in detail. I take the view that the plaintiff's claim must be dismissed. My reasons are as follows:

(a) I do not find merits in the defendants' argument that the development agreement or allocation agreement or supplementary power of attorney was signed in contravention of s 5 of the HDCLO 1993. That section reads as follows:

B

Section 5

C

(1) No proprietor, or person holding the written consent of the proprietor, of any alienated land for purpose of housing development shall engage in, carry out or undertake housing development in the State, unless he is a housing developer in possession of a licence issued under this Ordinance.

D

(2) Where a housing development is to be undertaken in phases within a housing development area, the licence may be issued to the housing developer for each phase of such housing development.

E

(3) Except with the written consent of the Controller, no housing developer other than a licensed housing developer shall assume or use in relation to his business or any part of his business the words 'housing developer' or any of its derivatives or any other word or words indicating the carrying on of the business of housing development.

F

(4) A housing developer, who desires to engage in or carry out or undertake or cause to be undertaken a housing development shall apply to the Controller for a licence and any such application shall be made in the prescribed form and, in the case of any applicant mentioned in column (1) of the Schedule, the application shall be accompanied by the documents specified opposite thereto in column (2) thereof, and every such document shall be verified by means of a statutory declaration made by the person mentioned in column (3) thereof.

G

H

(5) Upon receiving an application for a licence under subsection (4), the Controller may, subject to section 6, grant the licence applied for or refuse to grant such a licence; and in granting such a licence the Controller may impose thereon such conditions (including the period during which the licence shall be valid) as he may deem fit and proper.

I

(6) Subject to section 14, the Controller may at any time vary, cancel or alter the conditions of a licence or impose any new or

additional conditions; or, where the licence is not subject to any condition, impose thereon such conditions as the Controller may deem fit for carrying out the provisions of this Ordinance.

The reading of the section and s 5(4) of the Ordinance with Form A of the Housing Developers (Control and Licensing) Regulations 1998, it is clear that developers license is only necessary when land in issue per se has been approved for development purpose because the condition precedent to obtaining a developer's license requires the land title and the agreement with the landowners to be produced for the purpose of application. Thus, to argue that because the plaintiffs has no developer's license, the development agreement and other subsequent documents are invalid has no merits. However, the defendants' argument on s 8 of the SLC had merits. In this case, the said section prohibits the plaintiff who is a non-native from entering into the development agreement in the present form to represent an unconditional contract in relation to s 8 of the SLC which the court cannot give effect to. I have dealt with this area of law in the case of *Chelingga ak Asuh @ Asu v Wong Sew Yun & Ors* [2008] MLJU 0514, High Court of Sibu, Suit No 22–3 of 2004. And the relevant part reads as follows:

> I agree with the submission of the plaintiff that the land in question is a native customary land and only because the father of the plaintiff was a native, a grant in perpetuity of the area of land free of premium rent and other charges were granted. It is an exclusive privilege under SLC. It is quiet clear from other provisions of the SLC that non-natives cannot and/or restricted from enjoying any privileges or benefit of the native. This is clearly stated in s 8 of the SLC. The said land will not have been issued to the father if he was not a native. I am not satisfied by the pleadings of the defendants and the evidence adduced to support the proposition that it is mixed zone land and therefore the transfer was valid. I will say here that pleadings and evidence adduced on a fundamental point was not sufficient in law to find in favour of the defence.

The plaintiffs reliance on the case of *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379 to say the development agreement is not dealing in land and does not attract s 8 has no merits.

(b) Procedurally the court cannot grant the prayers sought in the present form by the plaintiffs in the consolidated action when all the necessary parties are not before the court. In this case, the second defendant had transferred the property to his son during the course of trial and the plaintiffs had also not made the personal

representative a party to the action. No amendment was sought to the prayers despite the suit was said to be consolidated.

In saying so, I am mindful what was recorded in the notes of proceeding which reads as follows:

> Suit No 22–62 of 2003 will be dealt with separately after counsel has informed the representative and served the papers as required by law. Further the defendants' counsel has informed the court that they will take necessary initiative to inform the beneficiaries to consent to the decision of the court in the above three suits. The plaintiffs have also consented that they will equally abide by the order of the court in the three suits as though it is binding the defendant. Parties may enter consent order at the end of this trial and upon the judgment of this court upon getting instruction from the defendant's administrator and/or representative.

(c) Even if I am wrong above, I am satisfied there is merit in the defendants complaint of delay and in consequence the defendants have rightfully terminated the development agreement. In this case, the delay complained of is not one which the parties have agreed to condone pursuant to the terms of the development agreement. Even the allocation agreement does not condone delay as last paragraph reads as follows:

> Except as contained herein the parties shall continue to be bound by all the terms and conditions of the said development agreeme nt which terms remain unaltered.

In all the above cases where the court has condone delay the facts and the delay was justified. On the facts of this case despite five years of the signing of the development agreement the plaintiffs' have barely started with the construction works. It is abhorrent to notions of justice and fair play to condone delay.

[8] For reasons stated above, I dismiss the plaintiff's claim. In relation to costs, I take the view that defendant in Suit No S-22–64 of 2003 must pay the costs of plaintiff's action as he did not inform the plaintiff of the change even at the commencement of trial. This has caused gross injustice to the plaintiff for reasons I have stated earlier. In consequence, I hereby order that in Suit No S-22–64 of 2003, the defendant to pay the cost of the plaintiff's action. The getting up fees shall not exceed RM100,000. If costs cannot be agreed, the plaintiff is at liberty to tax the costs. As solicitors in this suit also were responsible, it will be only proper not to grant an order of costs for the other defendants in the suit.

[9] On the issue of counterclaim. I take the view, that it must be dismissed with no order as to costs as the above judgment is already in favour of the defendants and the plaintiff is no more entitled to occupy the said land and the defendants' other rights are also spelt out in the said development agreement and it need not be endorsed by a declaratory relief.

I hereby order so.

Plaintiff's claim dismissed and defendants' counterclaims dismissed with no order as to costs.

Reported by Ashgar Ali Ali Mohamed